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No. 02-700

IN THE

Supreme Court of the United States

TURTLE ISLAND RESTORATION NETWORK, *et al.*,
Petitioners,

v.

DONALD L. EVANS, SECRETARY OF COMMERCE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF RESPONDENT NATIONAL FISHERIES INSTITUTE, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondent National Fisheries Institute, Inc. believes that the single question presented by this case is whether the United States Court of Appeals for the Federal Circuit properly applied well-established principles of statutory construction in upholding the State Department's interpretation of Section 609(b) of the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162.

RULE 29.6 STATEMENT

Respondent National Fisheries Institute, Inc. ("NFI") has no corporate parents, and it has no outstanding securities in the hands of the public. No publicly held company owns 10% or more of any of NFI's stock. NFI is a membership organization with more than six hundred member companies, some of which have publicly traded shares. A list of NFI's current membership will be provided on request.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
1. The Case Does Not Present Issues Related to the Roles of Coordinate Branches of Government or Conflict Between Domestic Statutes and U.S. International Trade Obligations	6
2. The Court of Appeals' Reading of the Act Is Well-Founded	8
3. Petitioners' Claims Concerning Market Effects Are Baseless	12
4. Petitioners' Claims of Environmental Harm Are Speculative	13
CONCLUSION	16

TABLE OF AUTHORITIES

Page

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987) 5
Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 8, 9
Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465 (1997) 10
Earth Island Inst. v. Christopher, 913 F. Supp. 559 (Ct. Int'l Trade 1995) 12
Earth Island Inst. v. Albright, 147 F.3d 1352 (Fed. Cir. 1998) 7
J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981) 5
Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 14
NCAA v. Smith, 525 U.S. 459 (1999) 5
Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) 13
Turtle Island Restoration Network v. Evans, 284 F.3d 1282 (Fed. Cir. 2002) ..... *passim*
Turtle Island Restoration Network v. Evans, 299 F.3d 1373 (Fed. Cir. 2002) (*en banc*) 1
Turtle Island Restoration Network v. Mallett, 110 F. Supp. 2d 1005 (Ct. Int'l Trade 2000) 2
United States v. Gonzales, 520 U.S. 1 (1997) 11
Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 5

STATUTES

Administrative Procedure Act, 5 U.S.C. § 706 5
Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, 103 Stat. 1037, § 609 (Nov. 21, 1989) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Endangered Species Act, 16 U.S.C. § 1531, *et seq.*	13
CONGRESSIONAL MATERIALS	
135 Cong. Rec. S12266 (daily ed. Sep. 29, 1989)	11
FEDERAL REGISTER NOTICES	
52 Fed. Reg. 24244 (June 29, 1987)	3
56 Fed. Reg. 357 (Jan. 4, 1991)	3
56 Fed. Reg. 1051 (Jan. 10, 1991)	9
61 Fed. Reg. 17342 (Apr. 19, 1996)	4, 6
61 Fed. Reg. 59482 (Nov. 22, 1996)	14
63 Fed. Reg. 46094 (Aug. 28, 1998)	4, 7
67 Fed. Reg. 32078 (May 13, 2002)	10
OTHER AUTHORITIES	
Foreign Trade Information Database, Fisheries Statistics & Econ. Div., Nat'l Marine Fisheries Serv., *at* http://www.st.nfms.gov/trade/index.html (last visited Dec. 2, 2002)	12
National Research Council, *Decline of Sea Turtles: Causes and Prevention* (National Academy Press 1990)	3
Turtle Safe Program web site, Sea Turtle Restoration Project of the Turtle Island Restoration Network, *at* http://64.84.44.17/seaturtles/site/prog_camp2.cfm?campaignID=15 (last visited Dec. 4, 2002)	4
U.S. Dep't of State: Sea turtle conservation and shrimp imports, *in* M2 Presswire (May 20, 1999), *available at* LEXIS, News Library, News Group File, All	15

TABLE OF AUTHORITIES—Continued

Page

U.S. Dep't of State: Sea turtle conservation and shrimp imports—Guyana Certification, *in* M2 Presswire (June 9, 1999), *available at* LEXIS, News Library, News Group File, All 15

U.S. Dep't of State: Suriname—sea turtle conservation and shrimp imports, *in* M2 Presswire (July 5, 1999), *available at* LEXIS, News Library, News Group File, All 15

U.S. Dep't of State, Press Release on Sea Turtle Conservation and Shrimp Imports (May 2, 2001), http://www.state.gov/r/pa/prs/ps/2001/2661.htm 14

U.S. Dep't of State, Press Release on Sea Turtle Conservation and Shrimp Imports (July 11, 2001), http://www.state.gov/r/pa/prs/ps/2001/4061.htm 14

WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Request for Consultations, WT/DS58/1 (Oct. 14, 1996) 6

WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R (May 15, 1998) 6

WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998) 6

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BRIEF OF RESPONDENT NATIONAL FISHERIES INSTITUTE, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent National Fisheries Institute, Inc. ("NFI")[1] submits this brief in opposition to the Petition for a Writ of Certiorari ("Pet.") seeking review of the judgment and opinion of the United States Court of Appeals for the Federal Circuit. The opinion below is reported at 284 F.3d 1282 (2002), Pet. App. A at 1a-38a. An order denying a petition for rehearing and suggestion for rehearing *en banc* is reported at 299 F.3d 1373 (2002), Pet. App. D at 103a-111a. The judgment of the Court of International Trade (the "CIT") denying Petitioners' request for injunctive relief is reported as

[1] NFI is a national seafood trade association, more than half of whose members are involved in handling imported shrimp at all phases of the domestic market chain. It has participated as an intervenor in every stage of this litigation in the trial and appellate courts, since Petitioners' original suit was filed in February, 1992.

Turtle Island Restoration Network v. Mallett, 110 F. Supp. 2d 1005 (2002), Pet. App. B at 39a-68a.

STATEMENT OF THE CASE

At issue in this case is the proper interpretation of a free-standing rider to the 1990 Appropriations Act for the Departments of Commerce, Justice, State, The Judiciary and Related Agencies, Pub. L. No. 101-162, 103 Stat. 1037, § 609(b) (Nov. 21, 1989) (the "Act" or "Section 609").[2] Section 609 provides as follows:

> (b)(1) *IN GENERAL* - The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles [*i.e.*, those subject to certain 1987 Department of Commerce protective regulations] shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).
>
> (2) *CERTIFICATION PROCEDURE*—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that—
>
> (A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and
>
> (B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the

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[2] The law also contains a subsection (a), no longer at issue in this litigation, that requires the State and Commerce Departments to undertake various international negotiation initiatives to protect sea turtles.

> average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or
>
> (C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

It is apparent that Section 609(b) has two operative provisions. Subsection (b)(1) requires the imposition of embargoes by the United States against "shrimp or products of shrimp which have been harvested with commercial fishing technology which may affect adversely" certain species of endangered and threatened sea turtles. Subsection (b)(2) specifies that embargoes against such products shall not be implemented, if the President certifies that the government of the harvesting nation has adopted sea turtle protection measures in its shrimp fisheries, and achieved a rate of incidental taking, comparable to those of the United States, or that the particular fishing environment of the harvesting nation poses no risk to sea turtles.

The U.S. State Department, acting pursuant to delegation from the President, *see* 56 Fed. Reg. 357 (Jan. 4, 1991), determined that the Act did not require the United States to embargo shrimp and products from shrimp harvested by foreign shrimp trawlers equipped with a particular technology designed to protect sea turtles, namely, U.S.-comparable Turtle Excluder Devices ("TEDs"). In so doing, it relied on the scientific understanding, accepted by all parties to this case, that, when used, TEDs reduce sea turtle mortality in shrimp fisheries by 97%. *See* 52 Fed. Reg. 24244 col. 3 (June 29, 1987). *See also* National Research Council, *Decline of Sea Turtles: Causes and Prevention* 7, 12, 93-96 (National Academy Press 1990).[3] The Department concluded that

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[3] Notably, for five years through December, 2000, Petitioner Turtle Island Restoration Network even operated a company-by-company and vessel-by-vessel certification program, labeling as "turtle safe" shrimp

"harvesting [with TEDs] does not adversely affect sea turtles" within the meaning the Act. *See* 61 Fed. Reg. 17342, 17343 col. 2 (Apr. 19, 1996), Pet. App. G at 129a, 132a; 63 Fed. Reg. 46094, 46095 col. 1 (Aug. 28, 1998), Pet. App. H at 139a, 141a.[4]

The Federal Circuit, applying well-established principles of statutory construction, found that the State Department acted lawfully in adopting this interpretation. In so doing, it relied primarily on "the plain words of the law," which it found "weigh[ed] heavily in the government's favor." 284 F.3d at 1291, Pet. App. A at 15a. The full Court, in rejecting the petition for rehearing *en banc*, declined to disturb that judgment. There is likewise no reason for this Court to disturb the judgment below.

REASONS FOR DENYING THE WRIT

Petitioners urge the Court to take this case on the grounds that the Federal Circuit's decision "violates fundamental tenets of our democracy." Pet. at 16. They strain to give the impression that this case raises multiple issues related to the balance of power among coordinate Branches of government,

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harvested with TED-equipped trawls. *See* Turtle Safe Program web site, Sea Turtle Restoration Project of the Turtle Island Restoration Network, *at* http://64.84.44.17/seaturtles/site/prog_camp2.cfm?campaignID=15 (last visited Dec. 4, 2002).

[4] In addition to concluding that TED-harvested shrimp is not covered by subsection (b)(1), the State Department determined that three other categories of shrimp were not subject to embargo under the Act because their harvest did not adversely affect sea turtles: (1) shrimp harvested by "means that do not involve the retrieval of fishing nets by mechanical devices," that is, basically shrimp harvested in artisanal fisheries, or by gear types exempt from TED requirements under U.S. law; (2) shrimp which are "harvested in areas in which sea turtles do not occur," that is, basically cold water or fresh water fisheries; and (3) "aquaculture" or "pond-raised" shrimp. Petitioners have never challenged the Department's determinations in this regard.

conflicts between domestic statutes and U.S. international trade obligations and the very survival of the U.S. shrimp industry and endangered and threatened species of sea turtles. However, when the rhetoric is swept to one side, it is apparent that the case, at bottom, presents a single, straightforward question of statutory construction under Federal law. There is no dispute about what principles of statutory construction must be applied. There is no overarching issue concerning what Supreme Court or Federal Circuit precedent is applicable. Petitioners simply do not like the particular application of well-settled principles in this case by the Federal Circuit. Thus, this case is no different than any other run-of-the-mill statutory interpretation case, and it is manifestly unsuitable for Supreme Court review.[5]

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[5] Petitioners also contend that this Court should review the determination of the CIT not to "set aside" the State Department's Guidelines once it ruled in favor of Petitioners on the merits. Pet. at 26-28. However, because the Court of Appeals overturned the CIT's merits judgment, it did not reach Petitioners' appeal of the lower court's decision not to grant them the relief they requested. 284 F.3d at 1297, Pet. App. A at 25a. In the absence of a Federal Circuit ruling, this issue is not a proper one for this Court to consider. Indeed, it is well-settled that this Court does "not ordinarily address for the first time . . . an issue which the Court of Appeals has not addressed." *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981); *see also NCAA v. Smith*, 525 U.S. 459, 469 n. 6 (1999). In any event, it should be noted that, if Petitioners' theory were accepted, this would effectively mean that in every case where agency action was found unlawful under the Administrative Procedure Act, 5 U.S.C. § 706, an injunction would have to issue. This is not, nor should it be, the rule. *See, e.g., Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

1. The Case Does Not Present Issues Related to the Roles of Coordinate Branches of Government or Conflict Between Domestic Statutes and U.S. International Trade Obligations.

Petitioners claim that the State Department adopted an untenable interpretation of the Act in order "to capitulate to a panel decision" of the World Trade Organization (the "WTO"). Pet. at 2. In turn, they argue that the Federal Circuit, in upholding the State Department's interpretation, "sanctioned the abdication of the roles of the Executive and Judiciary, by putting primacy in the rulings of an international treaty organization and derogating the authority of the United States Congress." Pet. at 2-3. Petitioners' claims are refuted by the record in this case.

The notion that the State Department's interpretation of the law was responsive to a WTO Panel decision is inconsistent with the chronology of this case. The State Department adopted the interpretation of the Act of which Petitioners complain in Guidelines issued in April, 1996. *See* 61 Fed. Reg. 17342, 17343 col. 2 (Apr. 19, 1996), Pet. App. G at 129a. At the time the April 1996 Guidelines were published, there was no WTO proceeding pending. Indeed, the parties that ultimately brought a WTO proceeding -- India, Pakistan, Malaysia and Thailand -- did not even ask for "consultations" under the WTO regime until October, 1996. *See* WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Request for Consultations, WT/DS58/1 (Oct. 14, 1996). The actual challenge did not result in a report by a Dispute Resolution Panel until May 15, 1998. *See* WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R (May 15, 1998). The WTO Appellate Body, in turn, did not rule on the Dispute Resolution Panel's decision until October 12, 1998. WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body,

WT/DS58/AB/R (Oct. 12, 1998) (the "WTO Appellate Body Decision"). It would indeed have taken remarkable clairvoyance for the State Department to have anticipated in April, 1996, the terms of a WTO Appellate Body Decision rendered almost two and one-half years later and to have devised its Guidelines accordingly.

Nor are Petitioners correct when they assert that the State Department "seized on the opportunity to issue new Guidelines" in anticipation of the WTO Appellate Body Decision. Pet. at 10. The State Department issued revised Guidelines in August, 1998. *See* 63 Fed. Reg. 46094 (Aug. 28, 1998), Pet. App. H at 139a.[6] At that time, it was not clear when the WTO Appellate Body would rule or what its decision might be. The reason for the issuance of revised Guidelines was not any specific, anticipated WTO decision. Rather, it was the June 4, 1998 decision of the Federal Circuit vacating an earlier CIT ruling setting aside the State Department's 1996 Guidelines. *See Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998). The Federal Circuit ruling freed the State Department to revert to its 1996 interpretation of the law—an interpretation that it had consistently and vigorously advocated throughout the

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[6] The rationale for the State Department's action is fully explained in a detailed decision memorandum, dated August 6, 1998, signed by Stuart Eizenstat, the Under Secretary of State for Economic, Business and Agricultural Affairs (the "Decision Memorandum"). The Decision Memorandum considered at length both the terms of the Act and concerns expressed by Petitioners and others in the environmental community about possible negative consequences of permitting imports of TED-harvested shrimp from uncertified nations. The State Department affirmed, among other matters, that it "continue[d] to believe that the harvesting of shrimp with TEDs does not adversely affect sea turtle species" and that its proposed course of action would encourage, rather than discourage, TED adoption around the world. The text of the Decision Memorandum appears in full in the Court of Appeals Joint Appendix (the "CAJA") at 101-109.

appellate process. It is unremarkable, and certainly not a "capitulation" to the WTO, that the State Department decided to revise and reissue its Guidelines following the Federal Circuit's decision.

It is likewise clear that the Federal Circuit's decision for which review is sought scarcely can be characterized as elevating WTO considerations above domestic statutory mandates. While the case certainly has implications for U.S. relations with its WTO partners, there is nothing in the Circuit Court's decision that indicates that WTO considerations dictated the outcome. To the contrary, the Panel, while acknowledging the existence of the WTO proceeding, expressly did not rely on it in any way in reaching its decision. *See* 284 F.3d at 1297, Pet. App. A at 25a. Petitioners' disquisition on the relationship between domestic statutes and U.S. international trade obligations is therefore irrelevant. *See* Pet. at 19-21. At no time in this case have Respondents ever argued that WTO decisions somehow could or should override domestic law, and the Federal Circuit's decision in no way stands for such a proposition.

2. The Court of Appeals' Reading of the Act Is Well-Founded.

Once the WTO argument is laid to rest, it is apparent that the case comes down to the straightforward question whether the State Department's reading of the Act is permissible under well-established principles of statutory construction. *See generally Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). The Federal Circuit's careful analysis of the Act readily withstands Petitioners' attack.

Petitioners betray the weakness of their case by characterizing the Act as establishing "a mandatory embargo against trawl-caught shrimp" from uncertified nations, Pet. at 5, or directing the Government "to embargo all mechanized

trawl-caught shrimp" from such nations. Pet. at 7.[7] But the Act contains no reference to "trawl-caught" or "mechanized trawl-caught" shrimp. Rather, it just refers generically to shrimp harvested with technology that may adversely affect sea turtles. Congress could have expressly written Section 609 to provide that "no nation may export *mechanized trawl-caught shrimp* to the United States unless certified" or that "all *mechanized trawl-caught shrimp* from an uncertified nation" must be embargoed. It did not, and, because the statutory phrase is not self-defining, the State Department was left with discretion to determine what commercial fishing technology adversely affects sea turtles and what technology does not. In light of this and other factors, the Federal Circuit, looking first and foremost at the plain meaning of the words of the Act, quite properly concluded that (a) it was up to the State Department to determine the categories of shrimp covered by the prohibition in subsection (b)(1), and (b) the Department's decision to permit the importation of TED-harvested shrimp was permissible and consistent with the statutory language. *See* 284 F.3d at 1297, Pet. App. A at 25a. *See generally Chevron*, 467 U.S. at 843-844.

Lacking support for their position in the language of the Act, Petitioners focus on its "structure," claiming that the Federal Circuit upheld a construction in which the "exception" swallows the rule. Pet. at 23. But the determination that TED-harvested shrimp are not subject to embargo has nothing to do with "exceptions." Rather, it

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[7] Petitioners cite to a 1990 report to Congress by then Secretary of State James Baker as reflecting an understanding that an embargo against all trawl-caught shrimp from uncertified nations was required. However, the citation proves too much. Secretary Baker refers to an embargo on *all* shrimp imports from uncertified nations. Yet, from the beginning, that is never how Section 609 has been implemented. Thus, for example, starting in 1991, the State Department did not view aquacultured, *i.e.*, farm-raised, shrimp, as being subject to embargo. *See* 56 Fed. Reg. 1051 (Jan. 10, 1991).

reflects the determination, clearly required by the terms of the Act, that not all shrimp and products of shrimp are subject to embargo but only those harvested with particular technologies. In any event, the Circuit Court fully addressed this line of argument, pointing out not only that the interpretation espoused by Petitioners "does not comport with the most direct reading of the law's words," 284 F.3d at 1292, Pet. App. A at 17a, but also that, if Petitioners' interpretation were accepted, and the certification process were the only way shrimp could be imported into the United States, then the reference to "commercial fishing technology which may affect [sea turtles] adversely" would be "largely superfluous language." 284 F.3d at 1292, Pet. App. A at 16a. Needless to say, "Legislative enactments should not be construed to render their provisions mere surplusage." *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997).

Equally unavailing is Petitioners' claim that the Federal Circuit ruling has "nullifie[d]" the entire certification process established under subsection (b)(2) of the Act. Pet. at 23-24. One would expect, if this were the case, there would be some evidence to that effect. However, there is none. To the contrary, if one looks at the most recent (2002) certification made by the State Department, it is apparent that certification remains the mechanism by which most shrimp exporting nations gain access to the U.S. market for their trawl-harvested shrimp. As of May 13, 2002, no less than 17 nations, including all major Latin American exporters except Brazil and such major shrimp exporting nations outside the Western Hemisphere as Pakistan and Thailand, were certified as having comparable sea turtle protection programs. *See* 67 Fed. Reg. 32078 (May 13, 2002).

Lastly, Petitioners claim that the State Department's interpretation of Section 609 "'flouts' the statute's legislative history." Pet. at 24-25. Where statutory language is clear,

analysis of legislative history is unnecessary. *United States v. Gonzales*, 520 U.S. 1, 5 (1997). However, the Federal Circuit opinion explores the legislative history in about as much depth as possible for an appropriations rider that lacks detailed committee reports and that consists of little more than imprecise usage and "scraps of casual word choice" on the House and Senate Floors. 284 F.3d at 1293, Pet. App. A at 19a. While Petitioners complain that there is no discussion in the legislative history of a "shipment-by-shipment" import restriction, Pet. at 13 n. 5, it is equally clear, as the Federal Circuit explains, that there is little history to support a focus on embargoing "nations." Further, the Court's reading of Section 609's history as primarily reflecting economic, rather than environmental concerns, is well-founded.[8] The Act's principal sponsors were Senators from Southern coastal states. Many of them expressed doubts about the appropriateness of TED requirements for domestic shrimp harvesters. *See, e.g.,* 135 Cong. Rec. S12266 (daily ed. Sep. 29, 1989) (statements of Sens. Johnston and Breaux). Their intent was to protect domestic shrimp harvesters in their states against competition from foreign shrimp harvesters not bearing the same costs of environmental protection. *See, e.g.*, 135 Cong. Rec. S12266 (daily ed. Sep. 29, 1989) (statement of Sen. Breaux). Given this focus on commercial concerns in the Act's legislative history, it was perfectly appropriate for the Court to conclude that Section 609 did not need to be interpreted strictly to maximize protection of sea turtles.[9]

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[8] Contrary to Petitioners' argument, the Federal Circuit did not determine that Section 609 lacked any environmental objectives but only that its "primary" objectives were economic, and its implementation should not be measured "solely" by environmental protection criteria. *See* 284 F.3d at 1294, 1295, Pet. App. A at 20a, 21a.

[9] This conclusion, it should be noted, was supported by the Court's consideration of "similar" U.S. statutes providing for embargoes. *See* 284 F.3d at 1295, Pet. App. A at 22a (citing 16 U.S.C. § 1825(b)(2), 16 U.S.C. § 1826a(b)(3)(A), and 22 U.S.C. § 1978(a)(4)).

3. Petitioners' Claims Concerning Market Effects Are Baseless.

Petitioners suggest that the State Department's interpretation of the Act, as upheld by the Federal Circuit, has major market effects and undercuts Congressional goals to protect the domestic shrimp industry. Pet. at 3. As Petitioners would have it, "the fate of the U.S. shrimping industry may well hang in the balance." Pet. at 3. However, in the body of the Petition, Petitioners never really argue the point, and with good reason. The suggestion is unfounded and, indeed, contradicted by the history of this case. In an earlier phase of the litigation, an association of shrimp harvesters from Georgia, represented by the same counsel for Petitioners, was named as co-plaintiff in the complaint. It utterly failed to support its claims that the State Department's interpretation then at issue, which limited the number of affected countries, had any demonstrable adverse economic impacts on its members, and it was dismissed for lack of standing. *See Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 564-565 (Ct. Int'l Trade 1995). NFI suggests that similarly before this Court "[g]eneral allegations of economic disadvantage" scarcely make Petitioners' case. *Id.*

Moreover, notwithstanding Petitioners' unsupported assertion of market injury, as far as NFI is aware, only two uncertified countries—Australia and Brazil—have sought to export TED-harvested shrimp to the United States. In 2001, collectively they shipped a total of 22,265,946 pounds of shrimp to the United States, or approximately 2.5% of the total 882,577,414 pounds imported. *See* Foreign Trade Information Database, Fisheries Statistics & Econ. Div., Nat'l Marine Fisheries Serv., *at* http://www.st.nmfs.gov/trade /index.html (last visited Dec. 2, 2002). It is highly unlikely that shrimp accounting for this small market share would have any discernible impact on overall prices in the United

States or that the fate of the U.S. industry thereby "hangs in the balance."

4. Petitioners' Claims of Environmental Harm Are Speculative.

Finally, Petitioners claim that the very "extinction" of endangered and threatened sea turtle species would be the "legacy" of the failure to overturn the Federal Circuit's decision. Pet. at 30.[10] This is so, Petitioners' argument goes, because the State Department's interpretation of the Act, as upheld by the Federal Circuit, will create a disincentive for foreign nations to adopt comparable sea turtle protection programs, leading to the ultimate demise of sea turtles. This issue was aired thoroughly before the Federal Circuit, which rejected Petitioners' unfounded contentions.

Simply put, there is no evidence whatsoever that the State Department's interpretation of the Act has had, or will have, the effects Petitioners claim. In fact, this possibility was fully considered by the State Department, which emphatically did not adopt Petitioners' views. To the contrary, as set out in the Under Secretary's Decision Memorandum, the State Department specifically determined, in adopting its 1998 revised Guidelines, that "[a]vailable evidence does not indicate that a decision to permit the importation of TED-caught shrimp from uncertified nations will cause foreign governments to abandon (or refrain from adopting) country-wide TED programs." CAJA at 104. It further concluded

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[10] In this regard, Petitioners also argue that the Federal Circuit decision is inconsistent with Supreme Court precedent interpreting the requirements of the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (the "ESA"). Pet. at 28-29, (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978)). However, Section 609 is a freestanding provision of an appropriations act, not part of the ESA. The Supreme Court's decision in *Hill*, construing the mandate of Section 7 of the ESA, thus has no bearing on this case.

that its interpretation would create incentives for individual harvesters to adopt TEDs to gain access to the U.S. market, with the result that "skepticism will lessen and the number of country-wide TED programs may increase." *Id.* at 107. It is these predictive judgments, made by knowledgeable agency officials charged with implementation of the Act, not those of Petitioners, which are properly entitled to deference from the Court. *See generally Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Last of all, the State Department's predictive judgment has been vindicated by events. Not only during the period between May 1, 1996 and October 8, 1996, when the 1996 Guidelines were in effect, but also since promulgation of the revised Guidelines on August 28, 1998, nations have not abandoned their national turtle protection programs,[11] and, in fact, exporting nations have adopted new programs. *See, e.g.*, 61 Fed. Reg. 59482 (Nov. 22, 1996) (Thailand); U.S. Dep't of State, Press Release on Sea Turtle Conservation and Shrimp Imports (May 2, 2001), http://www.state.gov/r/pa/prs/ps/2001/2661.htm (last visited Dec. 2, 2002) (Pakistan).[12] In

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[11] One major exporting nation, Indonesia, was decertified in July, 2001. *See* U.S. Dep't of State, Press Release on Sea Turtle Conservation and Shrimp Imports (July 11, 2001), http://www.state.gov/r/pa/prs/ps/2001/4061.htm (last visited Dec. 2, 2002). However, the decertification resulted from U.S. concerns about the effectiveness of Indonesia's enforcement of its program, not a decision by Indonesia to drop the legal requirement for TEDs in its shrimp fisheries. The State Department expressed the hope that the U.S. import prohibition would be "a brief measure," and indeed it is common for countries to be recertified after enforcement problems are remedied.

[12] While Thailand was not certified until after the issuance the Court of International Trade's injunction in October, 1996, in fact Thailand adopted its program in September 1996, almost a month before the lower court's ruling at a time when the State Department's then-extant guidelines permitted the importation of TED-harvested shrimp from uncertified nations.

addition, while some nations have been decertified for various failures in enforcement or implementation, these same nations, rather than being content with their uncertified status, have commonly remedied the problems and been recertified. *See*, *e.g.*, U.S. Dep't of State: Sea turtle conservation and shrimp imports, *in* M2 Presswire (May 20, 1999), *available at* LEXIS, News Library, News Group File, All (Costa Rica and Panama); U.S. Dep't of State: Sea turtle conservation and shrimp imports -- Guyana Certification, *in* M2 Presswire (June 9, 1999), *available at* LEXIS, News Library, News Group File, All (Guyana); U.S. Dep't of State: Suriname -- sea turtle conservation and shrimp imports, *in* M2 Presswire (July 5, 1999), *available at* LEXIS, News Library, News Group File, All (Suriname); U.S. Dep't of State, Press Release on Sea Turtle Conservation and Shrimp Imports (May 2, 2001), http://www.state.gov/r/pa/prs/ps/2001/2661.htm (last visited Dec. 2, 2002) (Honduras). As the Director of the State Department's Office of Marine Conservation concluded in May, 2000, the State Department's Guidelines are "promoting sea turtle conservation."[13] In short, the actual record is positive, suggesting that the incentive strategy adopted by the State Department is likely to have real prospects for success over the long term. Petitioners' dramatic rhetoric and predictions of impending environmental disaster blink reality.

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[13] Declaration of David Balton, Director, State Department Office of Marine Conservation, dated May 1, 2000 (CAJA 920-925).

CONCLUSION

For all the reasons set forth above, NFI respectfully submits that the Petition should be denied.

Respectfully submitted,

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